Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 1, 2018

CLAIM NO. 201400707

BLACK ENERGY INC. PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

JAMES HIGGINS
UNINSURED EMPLOYERS' FUND
BLACK ENERGY/PINE CREEK MINING
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

JAMES HIGGINS CROSS-PETITIONER

VS.

BLACK ENERGY INC. CROSS-RESPONDENT
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Black Energy Inc. ("Black Energy") appeals and James Higgins ("Higgins") cross-appeals from the May 2, 2016, Opinion, Award, and Order of Hon. R. Roland Case, Administrative Law Judge ("ALJ") finding Higgins became affected by coal workers' pneumoconiosis ("CWP") with his last date of exposure being December 23, 2013.

Relying upon the opinions of Dr. Sanjay Chavda, who was selected by the Commissioner of the Department of Workers' Claims, the ALJ concluded Higgins "established the presence of complicated CWP, Category 3/+ with Category "B" large opacity and no respiratory impairment evidenced by pulmonary function studies greater than 80%." Pursuant to KRS 342.732(1)(e), the ALJ found Higgins is totally occupationally disabled. Based on Higgins' testimony, the ALJ concluded Higgins' average weekly wage ("AWW") was $500.00. Because Black Energy and/or its insurance carrier failed to file notice of cancellation of its workers' compensation policy as required by KRS 342.340, the ALJ determined Black Energy's carrier was the insurer of record on December 23, 2013, Higgins' last date of exposure. Higgins was awarded total disability benefits and medical benefits. Both parties also appeal from the October 18, 2017, Order overruling Black Energy's petition for reconsideration.

On appeal, Black Energy contends the ALJ erroneously determined it is the responsible employer. It also argues Pine Creek Mining ("Pine Creek") is the employer liable for the award. Since it was uninsured, liability for Higgins' benefits falls on the Uninsured Employers' Fund ("UEF"). Black Energy also asserts the ALJ improperly calculated Higgins' AWW. On cross-appeal, Higgins asserts the ALJ erroneously underestimated his AWW.

Higgins' Form 102 asserts he was last employed by Black Energy/Pine Creek Mining on December 23, 2013, and became affected by CWP arising out of and in the scope of his employment. As the medical evidence is not in dispute, we will not address it.

Higgins' June 17, 2014, and June 8, 2015, depositions were introduced and he testified at the February 29, 2016, hearing. At his June 17, 2014, deposition, Higgins testified he last worked for Pine Creek or Black Energy on approximately December 23, 2013. He estimated he started working as a roof bolter for one or both entities on October 21, 2013. Higgins testified he was supposed to work six days a week but usually did not. Sometimes he worked two or three days a week. He was to be paid $100.00 a day. Sometimes James Smith ("James") paid

him by check and sometimes by cash.[1] Regarding the mode of payment, Higgins provided the following testimony:

> A: Well, when I first started there they would give me a check, and then after that he would just pay me just cash money.
>
> Q: So no more checks? He would just give you cash?
>
> A: Well, he'd pay me on a check, but it was just – I don't know how to explain. He just gave me a check for a hundred dollars a day for whatever I worked.
>
> Q: I mean, do you know if he like paid in taxes and stuff on the money you were paid?
>
> A: I really – I really don't know. I just know he just paid me, you know.
>
> Q: Were the checks like from Black Energy, like they were a company check?
>
> A: I guess it was just a company check.
>
> Q: Was everyone else paid the same way?
>
> A: I don't really know if they were or not.

Higgins testified the Pine Creek mine was closed because Pine Creek ran out of money and the state inspectors had shut the mine down due to regulatory violations. Higgins testified a boss and three other men worked with him at the mine. The mine site where he was

[1] James Smith and Wayne Smith were identified as the co-owners of Pine Creek.

working for Black Energy was located at Pine Branch in Mayking, Kentucky.

Before working for Black Energy, he worked for Sapphire Coal Company ("Sapphire").[2] Higgins testified he worked for Sapphire for almost four years. While at Sapphire, he earned $22.50 an hour working eight hours a day, five or six days a week. After leaving Sapphire, he drew unemployment and then went to work for Black Energy.

Higgins testified that after November 5, 2013, Black Energy stopped paying him. During the two weeks he was paid by Black Energy, he earned $400.00 the first week and $300.00 the second week. After November 5, 2013, he received a check from Pine Creek. Higgins explained:

> Q: No, Pine Creek and Black Energy, are they different companies?
>
> A: I would say. I'd say so, I guess. I didn't really understand that part. I don't know if they just went through it for the comp reasons. I don't know.
>
> Q: Now, Pine Creek, you said they just would pay you a hundred dollars a day –
>
> A: Yes.
>
> Q: -- after November 5th, when Black Energy stopped paying you?
>
> A: Yes.

[2] Sapphire was originally named as a party in the Form 102 but was later dismissed after it was determined Higgins' last date of harmful exposure was not with Sapphire.

> Q: So from October to November 5th, 2013, do you remember your paycheck saying Black Energy on them?
>
> A: I don't really remember exactly. I didn't really pay attention to that.
>
> Q: That's okay. Now, after November 5th when you would just be paid directly by check by Pine Creek, did the checks, did they look the same or were they directly from Pine Creek, or can you recall?
>
> A: No, no. They didn't look the same.
>
> Q: And what was different about them?
>
> A: I guess it was just one of his personal checks from Pine Creek.
>
> Q: Okay. So when you say personal check, was it a personal check from James Smith's bank account?
>
> A: I guess so. I'm not really for sure about that.

Higgins testified he stopped working for Pine Creek on December 23, 2013.

At his June 8, 2015, deposition, Higgins explained he went to the Pine Creek mine site twice checking on employment. On the second visit, Wayne Smith ("Wayne") sent him to Black Energy.[3] Higgins filled out an employment application and other papers at Black Energy's office. Those documents were signed by Higgins on October 15, 2013. He also took a drug test. He was unsure of the

[3] Wayne Smith is the father of James Smith.

date he went to work for Black Energy after filling out the papers. Higgins was to be paid $100.00 a day working six days a week. He testified he worked six days some weeks working ten to eleven hours a day. He testified that on October 29, 2013, he received a check from Black Energy for $307.30 based on $400.00 gross earnings that week. He denied receiving cash in addition to checks. He received a second check from Black Energy for $235.00 based on $300.00 gross earnings. He was unsure why he received less money for the second week. Regarding what he was told by one of the Smiths, Higgins testified as follows:

> Q: Okay. So when you indicated before you were initially indicate – thought you'd worked a $100 a day, six dollars – six days a week; is that right?
>
> A: Yes. That's – when he – when he hired me, and he said he would pay me a $100 a day, and he also said that he would pay me competitive to what the other mines was making after a few weeks.
>
> Q: Okay. But when you were working, and you didn't receive $600 for the – you got $400 the first week as gross, and $300 the second week that you were off there gross, were you working on a day and off a day? Were they closing every other day or so?
>
> A: No. We was – we was working.
>
> Q: Do you know why you didn't receive $600 or five – at least $500 for five days work, then?

> A: No, I didn't. I just – I guess they would just – you know, I thought they'd cut it out or something. I didn't …

Higgins testified he was fairly sure he worked five consecutive days when he started; however, a couple of days he had to "sit in a building and stuff, and – and they didn't actually, you know, just start, you know, running coal and stuff." After receiving his last check from Black Energy, Higgins continued to work at the Pine Creek mine. Thereafter, he believed he received a personal check. He did not understand why the name of the payor was different. Higgins testified his job did not change. He estimated he worked a month and a half to two months at Pine Creek after receiving his last check from Black Energy. Active mining was ongoing during that time. Higgins testified Pine Creek paid him $100.00 a day, and there were no amounts withheld from his check. However, when he worked for Black Energy, the taxes were withheld.

Higgins did not understand the relationship between Black Energy and Pine Creek. He understood he was hired by Wayne. He testified that when he received Black Energy's check, he thought Black Energy and Pine Creek were partners and Black Energy was doing the payroll. Regarding his conversation with one of the Smiths as to what he would be paid, Higgins testified as follows:

> Q: And I think you've indicated that it was your understanding you was going to get $100 a day?
>
> A: Yes, I was going to get $100 a day, and he said – and maybe – he said give him a little – just a little time, and he would pay me competitive what most of the other mines was getting –

At the hearing, Higgins testified he last worked for "Black Energy/Pine Creek Mining" working a couple of months running a bolting machine. He last worked on December 23, 2013. He learned Pine Creek was shutting down in mid-January. He did not receive a layoff slip from Black Energy or Pine Creek, nor was he told by Black Energy or Pine Creek that he was terminated. His wages were to be $100.00 a day working six days a week. While working for Sapphire, he ran a roof bolting machine and "would draw" between $1,400.00 and $2,000.00 every two weeks.

Significantly, Higgins testified that, for the first two weeks Black Energy issued him a check, Pine Creek would write a check to make up the difference to ensure he received $600.00 a week. He testified the supplemental check he received was a personal check. He denied receiving cash. He also identified the mode of payment as a cashier's check. Higgins identified the people associated with Pine Creek as James and Wayne Smith. Regarding the checks he

received for the two weeks he worked for Black Energy, Higgins provided the following explanation:

> Q: You were just asked the question about after you received the first two checks at Black Energy. Was that when – Was that when you started receiving the personal checks from the Smiths? Now, if I heard you correctly, you also indicated – Are you saying that you got paid checks from Black Energy and the Smiths to make up for the amount even when you was getting Black Energy checks?
>
> A: Yes.
>
> Q: Okay.
>
> A: Yes. They would – They – He paid me – Black Energy paid me whatever, you know … you know, they paid me, and then if … if … if it didn't add up to, you know, the … you know, the six hundred dollars, Pine Creek and them, they would … they would pay me the rest. They'd write me a check out to make up the difference.
>
> Q: A personal check?
>
> A: Yes.

After he stopped receiving checks from Black Energy, Higgins received checks from James or Wayne. He did not remember the number or the amount of the checks received from the Smiths. He acknowledged there were some weeks he did not work five days but he was paid $100.00 for each day worked.

Black Energy introduced the April 22, 2015, deposition of Collin Fultz ("Fultz"), President and sole owner of Black Energy. Fultz testified Black Energy provides contract work for coal mines. Pine Creek's address was 198 Carousel Drive, Mayking, Kentucky, which is also the location of the mine site. Pine Creek was a mining company owned by James and Wayne Smith. Wayne is the father of James. Fultz denied owning any interest in Pine Creek. Black Energy and Pine Creek are separate entities. Fultz acknowledged Black Energy had a business relationship with Pine Creek and provided the following explanation:

> A: We would – they would call us and say they needed a worker, or they would send the worker to us to hire and send to that location. And we would sign them up as far as their paperwork and W-4s and that stuff, and then we would send them onto the mines to be dir [sic] -- and Pine Creek would direct them as to what they wanted them to do or whatever.

To his knowledge, Pine Creek did not have workers' compensation coverage for its employees. Black Energy provided workers' compensation coverage for Black Energy's employees working at Pine Creek through an AIG policy. He testified he believed Pine Creek called Higgins and told him to go to Black Energy where he would be hired and in turn leased to Pine Creek. He reiterated that Black

Energy provided coverage for its employees working at the 198 Carousel Drive site. Higgins was hired on October 22, 2013, and Black Energy's first check was dated October 29, 2013. Higgins' next and last check was written on November 5, 2013. He testified he believed Higgins had stopped working at the Pine Creek mine because Pine Creek told him it had shut down. Fultz explained thereafter Black Energy did not receive any further information regarding Higgins' weekly work hours. He testified that usually personnel at the mine call in the time or fax a time sheet with the person's name and the hours worked. Fultz explained that on October 29, 2013, Higgins was due $400.00 and on November 5, 2013, $300.00. The invoices attached to Exhibit 1 of Fultz's deposition reveal Black Energy sent an invoice dated October 26, 2013, to Pine Creek for Higgins and another individual. For the first week, the amount due from Pine Creek for Higgins was $640.00. Exhibit 2 is an invoice dated November 2, 2013, with the rate for Higgins being $480.00. Exhibit 3 is Higgins' employment application with Black Energy. Exhibit 4 contains an invoice dated October 19, 2013, from Black Energy to Pine Creek and other documents.[4]

[4] This invoice does not pertain to Higgins.

Fultz explained the charges to Pine Creek included the amount due Higgins plus amounts for workers' compensation coverage and commission. Fultz testified Pine Creek did not lease the mine in Black Energy's name and Black Energy provided workers' compensation coverage solely for its workers working at the mine site.

Fultz testified Black Energy has no mining operations. The last invoice sent to Pine Creek concerning Higgins reflects the last day of Higgins' employment with Black Energy.

Fultz testified that he later checked with Pine Creek to determine its plans and was told it was shut down. Fultz testified he informed the insurance company to "drop them;" however, he did not know if the mine site was removed from the policy. Fultz also testified he "left the policy in effect" because he assumed Pine Creek was going to resume operations. To that end, he usually checked with the Smiths once a week to see if Pine Creek was working and was told it was still shut down.

Fultz testified that Higgins and another individual were the only Black Energy employees at the Pine Creek mine site. Fultz never told Higgins he was no longer a Black Energy employee. After Higgins was leased to Pine Creek, Fultz had no further contact with him. He estimated

Black Energy provided coverage for workers at the 196 or 198 Carousel Drive address for approximately five months in 2013. Fultz acknowledged the workers' compensation policy covering the Pine Creek mine site was never canceled.

> A: And – and the reason that we didn't drop coverage is because of the father and son actually worked there. And they were owners of the corporation, and they exempted theirself [sic] from Work Comp. So they was the las – you know, if they was owners, they was allowed to work there, and that's why we never –
>
> Q: Cancelled the coverage?
>
> A: -- we never cancelled the coverage or dropped the coverage because, you know, they might go a week or a month and not work, and then all of a sudden they'd call us and say, "Hey, we need two people up here." And sometimes they would just use – like, when they first started, we used – we had a security guard for a long time up there. And we used that security guard, and that was all we done for a long time was just the security guard.

The April 22, 2015, deposition of Keith Hall ("Hall"), Black Energy's sales manager, was introduced. He testified Black Energy leases employees to mines. Hall dealt with the Smith family, particularly James. James told him he was sending two men to Black Energy, Higgins and another man whose name Hall could not recall. Other than providing employees to Pine Creek, Black Energy had no other relationship with Pine Creek. The Pine Creek mine was

the only site where Higgins worked as a Black Energy employee. James told Hall that Pine Creek could not make it and it had to lay off the men. Hall testified he did not tell Higgins because he understood James had told him. Hall admitted he never spoke with James after that. He had no indication Higgins had continued to work for Pine Creek. Hall acknowledged he never told Higgins he was not a Black Energy employee. Hall testified that whenever the worker's time is not called in, the workers' compensation coverage is usually canceled.

In determining Black Energy and its workers' compensation insurance carrier were responsible for the benefits owed to Higgins, the ALJ provided the following findings of fact and conclusions of law:

> The Administrative Law Judge has carefully reviewed all of the lay testimony is this case. It presents a rather unique situation as to the proper employer in this case. Black Energy argues that the plaintiff was only working for them until approximately November 5, 2013. However, the plaintiff continued to work at the Pine Creek Mine site thereafter. His last exposure to dust was the [sic] December 23, 2013. On that date, the defendant, Pine Creek Mining, was uninsured, however the records of the Workers' Compensation Department indicate that there was a policy of insurance in effect on that date through Black Energy, Inc. The record is clear that the plaintiff at the recommendation of the defendant,

Pine Creek Mining, was employed by Black Energy, Inc. to work at the Pine Creek Mining site. After a couple of weeks, apparently the defendant, Pine Creek Mining, notified Black Energy, Inc. that they were closing. However, they, in fact, did not close but continued working for several weeks thereafter and continued to employ the plaintiff, James Higgins. The evidence is undisputed that James Higgins was an employee until December 23, 2013.

The essential issue for determination is whether the employer responsible for compensation benefits is the defendant, Black Energy, Inc., or the defendant, Pine Creek Mining. On the plaintiff's last day of exposure of December 23, 2013, the Pine Creek Mining site was insured through a policy issued to Black Energy. Black Energy failed to give the requisite notice of cancellation to the Department of Workers' Claims. Although, as the Uninsured Employers' Fund indicates, there may be some contractual issues between Black Energy and Pine Creek Mining. Those do not obviate Black Energy's or their insurance carrier's statutory duty to file a notice of cancellation of coverage. Attention is directed to *Traveller's [sic] Insurance Company v. Duvall,* 884 S.W.2d 665 (1994) wherein the Supreme Court discusses the purpose of the statue [sic] requiring insurers to file a notice of cancellation. The defendant, Black Energy, and/or their insurance carrier, having failed to file the notice of cancellation, is the insurer of record on the plaintiff's last date of exposure of December 23, 2013. They are therefore the responsible carrier for the award.

In any event, it is clear the plaintiff was an employee at the time

> of his last date of exposure and he is entitled to an award of total disability. The appropriate award will be entered against the defendant-employer, Black Energy, and/or their insurance carrier as providing coverage for Pine Creek Mining. The appropriate award shall be entered.

In determining Higgins had a $500.00 AWW, the ALJ entered the following findings of fact:

> The plaintiff's average weekly wage in this case is difficult to accurately determine since he worked less than thirteen (13) weeks for the defendant-employer. However, the plaintiff clearly testified that he was to earn $100.00 per day. However, he was paid $400.00 for one (1) week of work for Black Energy and $300.00 for another week. The plaintiff continued working for Pine Creek Mining. Considering all of the evidence before the Administrative Law Judge, the Administrative Law Judge is persuaded that the plaintiff was to earn $100.00 per day and work five (5) days per week. He will therefore determine the plaintiff's average weekly wage to be $500.00. Attention would be directed to *Huff v. Smith Trucking,* 6 S.W.3d 819 (Ky. 1999) when the Supreme Court indicated the Administrative Law Judge "must take into consideration the unique facts and circumstances of each case." They further indicated that the goal of KRS 342.140(d) and is to obtain a realistic estimation as to what the injured worker would be expected to earn in a normal period of employment. Quite simply, where the worker has worked less than thirteen (13) weeks, it presents a unique situation which requires the Administrative Law Judge to try to arrive at a realistic estimate of the

> workers' earning capacity. As indicated in *Marsh v. Mercer Transportation,* 77 S.W.3d 592 (Ky. 2002), the Administrative Law Judge is to consider other factors in such a situation. In this case, the Administrative Law Judge is persuaded that $100.00 per day and a five (5) day work week would be an accurate reflection of the plaintiff's earning capacity. In actuality, $100.00 per day for an underground coal miner was significantly on the low side based on the Administrative Law Judge [sic] experience of hundreds of coal mining cases. However, this would appear to be the best reflection of the plaintiff's expectations at the time he was injured. Based upon the testimony of the plaintiff, it is found that the plaintiff's average weekly wage is $500.00 per week.

Black Energy filed a petition for reconsideration making the same arguments it now makes on appeal. In overruling the petition for reconsideration, the ALJ provided the following explanation:

> The Petition for Reconsideration is essentially an attempt to reargue the case, which is not permissible. The ALJ clearly discussed the responsible employer on pages 9 and 10 of the Opinion. The plaintiff was hired by Black Energy to work for Pine Creek Mining. He was never told he was laid off or that he was no longer working for Black Energy. He continued working until December 23, 2013. The defendant, Pine Creek Mining, was insured through a policy issued to Black Energy. Black Energy failed to give the requisite notice of cancellation to the Department of Workers' Claims. Therefore, Black Energy and/or their

> insurance carrier having failed to file the notice of cancellation, is the insurer of record on the plaintiff's last day of exposure of December 23, 2013.
>
> Concerning average weekly wage, this was discussed on pages 7 and 8 of the Opinion. The average weekly wage of $500.00, if anything, is too low for a coal miner, but based on testimony of record, the ALJ finds it to be an accurate reflection of the plaintiff's average weekly wage.

In support of its first argument, Black Energy argues the evidence is uncontradicted that Higgins was hired by Black Energy to work at the mine site owned by Pine Creek. It asserts there is no dispute Black Energy obtained insurance for its employees working at Pine Creek's mine site and Higgins' employment with Black Energy ended on November 5, 2013. It argues that, at that point, Higgins became a direct employee of Pine Creek continuing to work for it through December 23, 2013. As a consequence, Pine Creek is the responsible employer, pursuant to KRS 342.316(1)(a), which directs that the employer liable for compensation for occupational disease shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease and engaged in the severance or processing of coal. Black Energy argues it is unimportant which company had insurance coverage. It cites

to the testimony of Fultz who clarified the relationship between Black Energy and Pine Creek. Black Energy argues its relationship with Pine Creek ended on November 2, 2013, when James called and advised the mine was closing. Black Energy notes Higgins received only two checks from it, one dated October 29, 2013, and the other November 5, 2013. Thus, Higgins' last date of employment with Black Energy was November 5, 2013, at which time Black Energy's relationship with Pine Creek ceased.

Black Energy argues Higgins' testimony supports the testimony of Fultz since he confirmed he was paid by Black Energy through November 5, 2013. Higgins acknowledged he received no further checks from Black Energy and had no further contact with it. Higgins also testified he began working directly for Pine Creek in an ongoing underground coal mining operation. Black Energy also notes Higgins testified he was paid directly by Pine Creek either by personal check or by cash. Black Energy argues Higgins' testimony confirms his last employer in the severance and processing of coal was Pine Creek. Thus, Pine Creek is the liable employer.

Black Energy argues the ALJ failed to make a determination as to the last employer required by KRS 342.316(1)(a). It also argues the ALJ further clouded the

issue by determining the employer responsible for the award. Black Energy argues that in the Order overruling the petition for reconsideration, the ALJ erroneously concluded since Black Energy failed to notify the Department of Workers' Claims of the cancellation of its coverage, Black Energy and/or its carrier is the insurer of record on Higgins' last date of injurious exposure. It contends the uncontradicted evidence establishes the last employment occurred with Pine Creek and not Black Energy. Therefore, the ALJ's failure to make this specific determination is reversible error.

Black Energy also argues Pine Creek bears the liability for the award and since it was uninsured, liability for the award falls on the UEF.

Finally, Black Energy argues the ALJ incorrectly calculated Higgins' AWW. It asserts since Higgins worked less than 13 weeks his AWW must be calculated utilizing KRS 342.140(1)(e). Black Energy asserts the record is devoid of any evidence of a similarly situated employee which could serve as a basis for the calculation of Higgins' AWW. Therefore, the most reasonable method is to add the gross amounts of Higgins' two paychecks from Black Energy and divide by two. This results in an AWW of $350.00. Black Energy takes the position that although Higgins testified

he was supposed to work six days a week at $100.00 per day, he never worked that amount weekly. It asserts Higgins never worked more than four days during either week he was employed by Black Energy because of a lack of available work. Black Energy contends the ALJ based the AWW calculation upon Higgins' expectation he would earn $100.00 per day working five days a week. It contends KRS 342.140(1)(e) does not take into account Higgins' unreasonable expectations or hopes in establishing an AWW.

On cross-appeal, Higgins asserts his actual wages at Sapphire should have been utilized in calculating his AWW.

KRS 342.340(1)(a) and (2) reads, in relevant part, as follows:

> (1) Every employer under this chapter shall:
>
> (a) Insure and keep insured its liability for compensation in some corporation, association, or organization authorized to transact the business of workers' compensation insurance in this state; or
>
> . . .
>
> (2) Every employer subject to this chapter shall file, or have filed on its behalf, with the department, as often as may be necessary, evidence of its compliance with the provisions of this section and all others relating hereto. Any insurance carrier or self-

> insured group providing workers' compensation insurance coverage for a Kentucky location shall file on behalf of the employer, with the commissioner, evidence of the employer's compliance with this chapter. Evidence of compliance filed with the department may include a named additional insured who has been provided proof of workers' compensation insurance coverage by the employer. The filing shall be made within ten (10) days after the issuance of a policy, endorsement to a policy, or similar documentation of coverage. Every employer who has complied with the foregoing provision and has subsequently canceled its insurance or its membership in an approved self-insured group, as the case may be, shall immediately notify, or have notice given on its behalf to the department of the cancellation, the date, and the reasons; and every insurance carrier or self-insured group shall in like manner notify the commissioner upon the cancellation, lapse, termination, expiration by reason of termination of policy period, or nonrenewal of any policy issued by it or termination of any membership agreement, whichever is applicable under the provisions of this chapter, except that the carrier or self-insured group need not set forth its reasons unless requested by the commissioner.

The above statute, although not in the same form, was interpreted by the Kentucky Supreme Court in Travelers Ins. Co. v. Duvall, 884 S.W.2d 665 (Ky. 1994), as requiring notification to the Commissioner of the Department of Workers' Claims of the cancellation or cessation of workers' compensation coverage so that the appropriate

action may be taken. When the carrier does not provide notice of cancellation, its policy remains in full force and effect. In Duvall, supra, the ALJ found the workers' compensation insurance policy, which had lapsed by its own terms prior to the date of the worker's injury, was still in full force and effect on the date of the injury because Travelers failed to comply with its duty to provide notice of the lapse in coverage as required by KRS 342.340(2). The Supreme Court noted that in 1990 KRS 342.340(2) was amended "to specifically require notification upon the cancellation, lapse, termination, expiration by reason of termination of policy period, or nonrenewal of any policy issued by the insurance carrier." Id. at 666. The Supreme Court agreed with the ALJ's decision that a "broad interpretation of the pre-amended version of the statute was required by the policy objectives of the statutory scheme and legislative intent." Id. It decreed, "the clear purpose of the statute was to monitor the employer's compliance with mandatory workers' compensation insurance." Id. at 667. Therefore, "every employer operating under the Act is required to insure potential liability by purchasing insurance or presenting proof of financial ability to pay directly any compensation subsequently owed." Id. In

holding Travelers was liable even though its policy had expired, the Supreme Court decreed as follows:

> The notice requirement of KRS 342.340(2) is designed to inform the Board of any cessation in coverage so that appropriate action may be taken. The success of this system of monitoring is greatly reduced by a narrow interpretation of the term "cancellation." While we recognize a technical difference in the terms "cancellation" as a premature termination of coverage, and "expiration" as termination by nonrenewal, the result is identical in that the employer is no longer insured. It is this result that KRS 342.340(2) seeks to monitor. The legislature has removed all doubt by its 1990 amendment, but we accept that it intended the same notification, regardless of the technical argument, prior to the amendment.

Id.

In the case *sub judice*, the record reveals on June 26, 2014, the Commissioner of the Department of Workers' Claims certified Pine Creek, 196 Carousel Drive, Mayking, KY 41837 had workers' compensation insurance in Kentucky on the date of the alleged injury of December 23, 2013. The Commissioner also stated Pine Creek was leased under Black Energy and the insurance carrier was Insurance Co. of the State of PA. The policy issued by AIG, introduced in the record, listed Black Energy, 198 Carousel Drive, Mayking, KY 41837 as the site afforded workers'

compensation coverage. The policy is replete with notations that AIG provided workers' compensation coverage for the employees at that mine site. Further, there is no dispute that Black Energy's workers' compensation insurance policy covering the Pine Creek mine site was in effect on the date of Higgins' last injurious exposure. Unlike in Duvall, supra, the workers' compensation policy providing coverage at the Pine Creek mine site was not cancelled, nor had coverage expired. Fultz testified the policy was not cancelled in anticipation of Pine Creek resuming mining operations. Since Black Energy did not cancel the policy providing coverage for the mining operations at the Pine Creek mine, its carrier, as found by the ALJ, is liable for the income and medical benefits due Higgins. We note the AIG policy does not limit workers' compensation coverage to specifically identified employees. Rather, the policy identifies specific locations.

Moreover, had Black Energy or AIG notified the Commissioner it was no longer providing workers' compensation coverage for the employees at the Pine Creek mining site, the appropriate action could have been taken to ensure Pine Creek had the necessary workers' compensation coverage as required by law. Since Black Energy or AIG failed to notify the Commissioner that it was

cancelling the policy and no longer providing coverage for the employees at the Pine Creek mine site, Black Energy's carrier, AIG, bears the liability for Higgins' benefits. The ALJ's determination that Black Energy and its carrier are the responsible parties for Higgins' income and medical benefits will be affirmed.

Black Energy's second argument fails since Black Energy through its insurance carrier is responsible for Higgins' income and medical benefits. Consequently, there is no uninsured employer as contended by Black Energy, and the UEF does not bear the liability for those benefits.

Concerning Black Energy's third argument, since Higgins worked less than thirteen weeks for Black Energy/ Pine Creek, his AWW must be calculated pursuant to KRS 342.340(1)(e). KRS 342.140(1) provides in relevant part, as follows:

> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> . . .
>
> (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in

> the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;
>
> (e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation; and …

Higgins testified he earned $400.00 the first week and $300.00 the second week as an employee of Black Energy. However, he testified at the hearing the owners of Pine Creek made up the difference in order to ensure he earned $600.00 a week during the two weeks he was paid by Black Energy. We acknowledge Higgins' testimony regarding his earnings after November 5, 2013, is unclear.

Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999) dealt with a similar situation. Huff had worked as an underground miner until he was laid off in December 1992. In January, 1993, the owner of Smith Trucking bought timber rights to a parcel of land. Smith Trucking employed Huff to work the timber anticipating the project would take 15-20

days of actual work. However, the project was expected to extend over a longer period than 15-20 days because the work would only be performed in good weather. There was no indication other jobs were available beyond this particular job. Huff was to be paid $75.00 for each day he worked. He had worked five days over a two-week period when he sustained a head injury. Smith Trucking ceased operations after the accident and subsequently went bankrupt. Relying upon C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991), rather than dividing the amount Huff earned by 13, the ALJ chose to divide the total amount earned by the weeks worked producing an AWW of $187.50. The Board reversed and based on the facts, construed KRS 342.140(1)(e): "1) to provide that the AWW should reflect what claimant would have earned had he been employed for a full 13 weeks in the same occupation before being injured, and 2) to permit evidence concerning whether work was available to workers employed by other employers." Id. at 820. On remand, the ALJ determined from Huff's testimony that timber cutting was available in the area where he resided and typically paid $75.00 per day. Thus, the ALJ concluded the AWW was $375.00.

The Court of Appeals reversed; however, the Supreme Court reversed the Court of Appeals. The Supreme

Court noted KRS 342.140(1)(e) applies to injuries sustained after fewer than thirteen weeks employment and utilizes the averaging method set forth in KRS 342.140(1)(d). This mirrors the facts in the case *sub judice*. Higgins had not worked thirteen weeks at the time of his last injurious exposure. Further, his employer had shut down operations after his last date of injurious exposure. In Huff, supra, the Supreme Court instructed as follows:

> In view of the unique facts which are present in this case, we conclude that the Board properly construed KRS 342.140(1)(e) as authorizing a consideration of evidence concerning the wages earned by timber cutters who worked for other employers in the area where claimant lived and concerning the availability of such work. We are persuaded that claimant's uncontradicted testimony sufficiently demonstrated that timber cutting work was available at $75.00 per day in the area in which he resided. It is clear, however, that in arriving at an average weekly wage of $375.00 pursuant to KRS 342.140(1)(e), the ALJ and the Board failed to consider the effect of the weather upon the average weekly wage that claimant could reasonably have expected to earn as a timber cutter during the 13 weeks preceding his injury. The only evidence in that regard came from claimant's actual experience and indicated that the weather permitted timber cutting approximately 50% of the time. In view of that uncontradicted evidence, we, like the Court of Appeals, conclude that there was no substantial evidence to indicate that claimant would have

> worked every day during the relevant 13-week period.

Id. at 822-823.

Here, Higgins testified that, during the two weeks he was paid by Black Energy, Pine Creek made up the difference in his wages allowing him to earn $600.00 per week. Higgins acknowledged that after he began working directly for Pine Creek, he may have been off for a couple of days but he still continued to earn $100.00 a day up until the date of his last injurious exposure. The ALJ was persuaded, based on Higgins' testimony, that he would have continued to work five days a week at the undisputed rate of $100.00 a day. Although the ALJ impermissibly relied, in part, upon his experience, it is clear from Higgins' testimony and Sapphire's wage records that Higgins' AWW at Sapphire was at least $1,472.54. Thus, the $500.00 a week is not an unrealistic estimation of what Higgins would be expected to earn in a normal employment period while working at the Pine Creek mine.

The Supreme Court's holding in Abel Verdon Construction v. Rivera, 348 S.W.3d 749 (Ky. 2011) is also instructive. There, the Supreme Court allowed the ALJ to utilize the method employed by the ALJ in this case. First, Miguel Rivera ("Rivera") testified he worked for two weeks

before he was injured. He worked three days the first week and four days the second week. He testified he earned $50.00 per day and earned a total of $250.00. His supervisor, Martinez, testified Rivera earned $7.00 to $8.00 per hour, performed necessary work, and received his wages in cash. Martinez could not remember the exact number of days Rivera worked but thought he had worked three days the first week and two days the second week. Verdon, who did not participate in the action, did not submit evidence to the contrary. The Supreme Court held KRS 342.140(1)(e) controls the AWW calculations because Rivera worked less than thirteen weeks before his injury occurred. It noted the ALJ found it difficult to apply KRS 342.140(1) under the circumstances, but based on Rivera's testimony, concluded Rivera worked three days per week and earned $50.00 per day yielding an AWW of $150.00. In affirming the ALJ, the Supreme Court held as follows:

> Chapter 342 requires the findings of fact that support an award to be based upon substantial evidence. It does not require documentary proof of a worker's average weekly wage in a case where nothing refutes testimony by the worker and his foreman that the employer paid its employees in cash. As stated previously, KRS 342.285(1) permits an ALJ to pick and choose from the witnesses' testimony and to draw reasonable inferences from the evidence. The ALJ relied on the

> testimonies of the claimant and Martinez to find an average weekly wage of $150.00. The Court of Appeals did not err by affirming the finding because it constituted a reasonable estimate of what the claimant probably would have earned had he worked for the full 13-week period immediately preceding his injury when work was available. [footnote omitted]

Id. at 757.

Here, as he was permitted to do, the ALJ relied upon Higgins' testimony in concluding he worked five days per week earning $100.00 a day. As Higgins' testimony constitutes substantial evidence in support of the ALJ's determination his AWW is $500.00 a week, we have no authority to disturb that finding.

Similarly, we find no merit in Higgins' incredulous assertion that his AWW should be based on his earnings while employed by Sapphire. Simply stated, Higgins never testified his AWW would equate to the amount he earned during his last quarter with Sapphire. Higgins' testimony establishes he was to receive $100.00 a day working five or six days a week. The ALJ was not convinced Higgins worked six days each week. Thus, the ALJ concluded, based on Higgins' testimony, his AWW is $500.00. The ALJ's decision will not be disturbed.

Accordingly, on all issues raised by Black Energy on appeal, the ALJ's May 2, 2016, Opinion, Award, and Order and the October 18, 2017, Order ruling on the petition for reconsideration are **AFFIRMED**. On cross-appeal, the ALJ's decision as set forth in the May 2, 2016, Opinion, Award, and Order and the October 18, 2017, Order ruling on the petition of reconsideration are **AFFIRMED**.

ALL CONCUR.

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